

## APPEAL NO. 010456

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on February 8, 2001, the hearing officer resolved the sole disputed issue by finding that while the appellant (claimant) did work during the qualifying period for the 10th quarter, he did not return to work in a position which was relatively equal to his ability to work; that he did not make a good faith effort to obtain employment commensurate with his ability to work; and that his underemployment was not a direct result of his impairment from the compensable injury. The claimant asserts on appeal the insufficiency of the evidence to support these findings as well as the conclusion that he is not entitled to supplemental income benefits (SIBs) for the 10th quarter. The respondent (carrier) urges in its response that the evidence is sufficient to support the challenged findings and conclusion.

### DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, while employed as a truck driver, he slipped on the running board of a truck, grabbed for a bar, and "jerked" his back; that he subsequently underwent two lumbar spine operations (December 7, 1994, and June 21, 1996); that between January 1997 and April 1999 he worked for various periods of time as a clerk and as a truck driver for six different employers and was either laid off or, in some cases, quit because he could not perform required lifting; that in May 1999 he had a heart attack, underwent quadruple coronary artery bypass surgery on May 16, 1999, and was in rehabilitation until October 1999; and that from that time until May 2000 he worked as a clerk for two different private mail centers and was laid off by these employers. The claimant further testified that as of the date of the hearing he was 64 years of age; that he held a bachelor's degree (1956) and a master's degree in business administration (1961); that after flying for the Navy, he spent three years as a Viet Nam POW (and two years in post-escape rehabilitation); that he worked as a parts salesman from 1969 until 1985; and that in 1992 he began working as a truck driver. A medical record reflects that he worked for the National Security Agency as a covert agent for 17 years. The parties stipulated that the qualifying period in issue began on May 20 and ended on August 18, 2000. The claimant testified that from May 16, 2000, through August 18, 2000, he worked from 35 to 40 hours a week at an equine center scheduling stable hands, buying feed, and balancing the checkbook. He acknowledged that this job, which paid \$225.00 per week, was a temporary position created for him by friends to help him out until he found something more permanent. He further stated that in mid-June 2000 he applied for a concierge position at a new hotel, thereafter had several interviews, obtained the job, and on August 18, 2000, he commenced full-time employment in that position.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than

80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The parties stipulated that the claimant's IR is 26% and that his AWW is \$659.89. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. The hearing officer found that during the qualifying period, the claimant did not return to work in a position relatively equal to his ability to work and did not make a good faith effort to obtain employment commensurate with his ability to work; and, that the impairment from his compensable injury was not a cause of his reduced earnings.

The hearing officer correctly notes that the claimant introduced no medical records showing that during the qualifying period he had only a limited ability to work. According to the medical records, prior to October 11, 2000, the claimant last saw his treating doctor, Dr. B, on September 9, 1998. The hearing officer also states that the claimant's evidence is insufficient to establish that "his purported job with" the equine center was "relatively equal to his ability to work." The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We cannot say that the challenged findings and conclusion are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Susan M. Kelley  
Appeals Judge